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September 19, 2019

Via ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
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Re: Notice of *Ex Parte, In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155

Dear Ms. Dortch:

These *ex parte* comments and the attached declarations[1] are filed on behalf of Competitive Local Exchange Carriers BTC, Inc. d/b/a Western Iowa Networks, Goldfield Access Network, Great Lakes Communication Corporation, Northern Valley Communications, LLC, OmniTel Communications, and Louisa Communications (collectively, the "CLECs") in response to the draft Report and Order released on September 5, 2019, in the above-referenced proceeding.[2] The CLECs are also joined by No Cost Conference, Inc., Total Bridge, Inc. and Sipmeeting, LLC, who also adopt the arguments previously submitted by the CLECs in this docket.

As explained in more detail below, despite the CLECs' efforts to move the Commission towards evidence-based access stimulation rules, the Draft Order relies upon unverified and unsubstantiated IXC assertions to establish new access stimulation regulations that are arbitrary, capricious, and discriminatory. Unlike anything envisioned in the agency's Access Stimulation NPRM,[3] this Draft Order, if adopted, would not only eliminate free services that millions of Americans find valuable, but also deprive numerous rural carriers of a business-sustaining revenue stream and subject new carriers to rules that they never anticipated applying to their businesses (all within a very brief period of time). At the very least,

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1 *See* Declaration of Matthew Alan Bathke on Behalf of Sipmeeting, LLC ("Sipmeeting Declaration"); Declaration of James Groft on Behalf of Northern Valley Communications, LLC ("NVC Declaration"); Declaration of John J. Hass on Behalf of Total Bridge, Inc. ("Total Bridge Declaration"); Declaration of Joshua Dean Nelson on Behalf of Great Lakes Communication Corporation ("GLCC Declaration"); Declaration of Thadeus Jay Nelson on Behalf of No Cost Conference, Inc. ("NCC Declaration"); Declaration of Kevin Skinner on Behalf of BTC, Inc. d/b/a Western Iowa Networks ("BTC Declaration").

2 *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Report and Order and Modification of Section 214 Authorizations (circulated Sept. 5, 2019) ("Draft Order").

3 *See In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Notice of Proposed Rulemaking (June 5, 2018) ("Access Stimulation NPRM").

the Draft Order is arbitrary and capricious because of its erroneous conclusions that are contradicted by record evidence and because of the Commission's failure to gather and adequately consider evidence to substantiate its claims. But, the Draft Order, if adopted, will also violate the Fifth Amendment's Takings Clause. Accordingly, the CLECs (once again) urge the Commission to either adopt a uniform rate for access stimulating traffic that mirrors the rates charged by PacBell or postpone any further action in this docket unless and until it gathers current data and evidence from the relevant parties.

I. The Commission's Failure to Obtain Relevant Data and Evidence from the IXCs Demanding These Rule Changes Has Produced A Draft Order that is Arbitrary and Capricious

To ensure the Commission's access stimulation rulemaking was evidence-based, actually necessary, and in the best interest of the American people (and not just in the interest of AT&T's and Verizon's shareholders), the CLECs on numerous occasions requested that the Commission require IXCs and CEA providers to make relevant books and records available for inspection by the agency and interested parties.[4] Indeed, the CLECs detailed the agency's authority for requesting such data during notice-and-comment rulemaking[5] and provided the Commission with a combined list of 28 document requests that would help the agency make an informed assessment of the current access stimulation and intercarrier compensation regimes.[6] Various Commission members and staff agreed with the CLECs that obtaining up-to-date information would be essential to ensure that any proposed rules would not be arbitrary and capricious and reiterated the Commission's stated commitment to engaging in a fact-based rulemaking process going forward.[7]

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[4] *See e.g.*, Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 4-5 (May 13, 2019) ("May 13 *Ex Parte* Letter"); Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1-2 (Feb. 14, 2019) ("February 14 *Ex Parte* Letter"); *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Reply Comments of Competitive Local Exchange Carriers at 2-3 (Aug. 3, 2018) ("CLEC Reply Comments"); *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Comments of Competitive Local Exchange Carriers at 50-51 (July 20, 2018) ("CLEC Comments").

[5] *See* CLEC Comments at 42-50.

[6] *See id.* Exh. D.

[7] *See, e.g.*, Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Aug. 16, 2018) ("CLEC-O'Rielly Meeting *Ex Parte* Letter") ("Mr. Groft asked Commissioner O'Rielly if he supported evidence-gathering and fact-based rulemaking in this docket before the adoption of proposed rules. Commissioner O'Rielly assured the CLECs that, while he has not had the opportunity to review the record regarding the Access Stimulation NPRM, he remains committed to the principle of evidenced-based rulemaking. He asked the CLECs to update him regarding their efforts to work with the Wireline Competition Bureau and the Chairman's Office to obtain additional data from the long-distance carriers and CEA providers necessary to develop a full record in this proceeding."); Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (Aug. 16, 2018) ("CLEC-WCB Meeting *Ex Parte* Letter) ("Wireline Competition Bureau Chief Montieth acknowledged the CLECs' concern and assured the CLECs that the Bureau is committed to engaging in a fact-based rulemaking. We then explored evidence-gathering procedures that the Bureau could undertake in this proceeding to test many of the unsupported allegations made by AT&T and others."). Indeed, since making these comments, Commission members have continued to remark how crucial it is to receive input before making industry-altering decisions. *See, e.g.*, RCR Wireless News, *Remarks by FCC Commissioner*

Despite the CLECs' numerous requests and the Commission's statements of support, the Commission has *never* issued *any* of the CLEC's proposed data requests,[8] choosing instead to draft an order based on the IXCs' unverified and unsubstantiated allegations and using data from the Commission's 2011 *Connect America Fund Order*. Worse yet, the Commission's proposed *Report and Order* uses the lack of current IXC-related data and evidence to criticize the CLECs' positions and the CLECs' expert, Dr. Daniel Ingberman, condemning his analysis for failing to account for data that is closely guarded by the IXCs and that has never been made available to the CLECs[9] – data that would have been available had the Commission issued the proposed data requests or otherwise obtained it from the IXCs.

For example, the Commission takes issue with the fact that Dr. Ingberman's analysis "does not take into account the cost that access stimulators impose on larger networks and their subscribers."[10] However, the Commission never issued the CLECs' proposed data requests asking for documents from the IXCs "showing that … access stimulation was a factor in how [they] set long distance rates" or data establishing whether IXCs gained or lost revenue (and how much revenue) based on their delivery of retail or wholesale traffic to access-stimulating CLECs.[11] The Commission also asserts that Dr. Ingberman failed to consider the alleged "inefficiencies" that IXCs must face to combat access stimulation,[12] yet the Commission never issued the CLECs proposed data request that, if issued, would have shown the considerable IXC-perpetuated inefficiencies caused by their advanced nonpayment schemes.[13]

It is bad enough that the Commission failed to seek current data and records from the IXCs and CEA providers before supporting their hyperbolic claims of harm and lost revenue. But to use the lack of available data to strike down the documented and supported assertions of the carriers who specifically asked for such evidence is plainly arbitrary and the epitome of capricious agency action.

Geoffrey Starks, YouTube (Sept. 17, 2019), available at http://youtube.com/watch?v=JGGKCXoon4Y (noting in remarks before the Competitive Carriers Association Annual Convention that "as a Commissioner, something I believe deeply in, of course, is process and input").

[8] According to an April 9, 2019 *ex parte* letter submitted by AT&T, Commission staff did pose certain questions regarding its prong 1 and prong 2 proposals to AT&T during a meeting; however, in providing responses to those questions, AT&T stonewalled at least 6 of them. *See* May 13 *Ex Parte* Letter at 3. Moreover, its responses to the other 7 questions just paraphrased the same unsupported statements the IXC made in earlier filings to the Commission. *See id.* at 2-6. Thus, to date, the Commission has not issued – and no carrier has answered or provided data related to – any of the CLECs' proposed data requests.

[9] *See* Draft Order at 12-13 ¶¶ 29-31.

[10] *Id.* at 13 ¶ 31.

[11] *See* CLEC Comments Exh. D (data/document request nos. 6, 7, and 14).

[12] *See* Draft Order at 13 ¶ 32.

[13] *See id.* Exh. D (data/document request nos. 1).

II. The Draft Order Reaches Numerous Erroneous Conclusions that Are Contradicted by Current Data and Record Evidence

A. The Evidence Refutes the Conclusion that Non-Users of Free Conferencing and Audio Services Subsidize Users of These Services

The Draft Order states that the "benefits of 'free' services enjoyed by an estimated 5 million users of high volume calling services are paid for by the more than 121 million subscribers of voice services across the United States, most of whom do not use high-volume calling services."[14] The Commission's conclusion is severely flawed.

First, the CLECs did not estimate that there are only 5 million users of high-volume calling services, as the Draft Order erroneously asserts. To the contrary, the CLECs were clear that their estimate included the number of Americans using "their long-distance plan to call into conference call and audio broadcast services hosted ***by just these CLECs on a monthly basis.***"[15] The CLECs did not endeavor to estimate the total number of Americans that enjoy the benefit of free conference calling and broadcast services either nationwide or for a period of time beyond a single month because they did not have the data necessary to do that. Nevertheless, as the Commission knows, numerous other LECs host these types of calls. Moreover, some users of the service do not utilize the service on a monthly basis, and thus the total number of users would certainly be greater than 5 million. Indeed, according to evidence filed by HD Tandem, the total number of unique users for the calls they complete totaled "75 million [] this year."[16] The Draft Order misrepresents the record and fails to adequately evaluate the actual number of American consumers who will be deprived of these services if the new rules are adopted.

Second, whether the number of high-volume calling service users is 5 million or 75 million, the Draft Order's conclusion that non-users subsidize the users of these services is supported by no record evidence and defies logic. The reality is that simple math demonstrates that users of these services more than pay their fair share. Assume that the average American pays only $23.00 for telephone service (an extremely conservative estimate).[17] Five million users paying $23.00 for service every month would generate revenues of $1.38 billion. Seventy-five million users paying this amount every month would generate revenue of $20.7 billion.[18] In stark contrast, the Draft Order credits unsubstantiated estimates from IXCs that "access arbitrage currently costs [them] between $60 and $80 million annually,"[19] while entirely ignoring the CLECs' estimate that the costs are no more than $37 million in light of AT&T's

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14 Draft Order at 11 ¶ 25.

15 CLEC Comments at 16 (emphasis added).

16 Letter from D. Erickson, President, HD Tandem, to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 4 (Sept. 16, 2019) ("HD Tandem *Ex Parte* Letter").

17 This is the average rate billed for "Residential Basic Service Rates" by four carriers in California for 2018. *See* Grawe Report, Exh. 2 (attached to CLEC Comments). The data suggests that most users pay significantly more for unlimited long-distance plans, so this is an extremely conservative analysis.

18 In further contrast, AT&T paid out $12 billion in dividends in 2017, while Verizon paid out $9.5 billion in dividends in 2017. *See* Grawe Report at 12-13.

19 Draft Order at 5, 9-10 ¶¶ 9, 20, 23.

rampant self-help[20] and the substantial cost savings that the Commission recently produced through its tariff investigations of SDN and Aureon.[21] The Commission offers no rationale, and certainly no evidence-based analysis, for the conclusion that more than $1.38 billion in revenue would be insufficient to cover the entire cost of the calls made by American consumers that elect to use the long-distance plan they already paid for to access free conference calling and similar services, even based on the Commission's inflated estimate that those costs may be as much as $80 million annually.

B. The Draft Order Erroneously Concludes that Consumers Will Be Better Off Without Free Conferencing Services

The Draft Order continues to rely on "economic theory" to conclude that "some savings [will] flow through to IXCs' customers" if access charges are reduced.[22] However, the Commission fails to acknowledge that its economic theory is premised on the assumption that the long-distance market is fully competitive. Moreover, in reaching this conclusion, the agency fails to confront the contrary evidence that completely undermines its assumptions and theories.

As one of the CLECs' experts, Oliver Grawe, stated in his economic analysis of the Access Stimulation NPRM, the Commission "does not provide any analysis of how the pre-2011, 2011, and post-2011 clarification-orders have actually affected consumers or suppliers."[23] The Draft Order suffers from this same flaw and ignores the record evidence that, far from producing savings for consumers, the access charge reforms have actually resulted in increased consumer costs for residential wired services.[24] The Commission's refusal to collect evidence, and its continued reliance on unsubstantiated economic theory in the face of this contradictory data, is arbitrary and capricious rulemaking.[25] In light of the fact that the Commission offers no explanation for why consumers are facing higher prices (when it promised its 2011 reforms would produce lower prices), the Commission cannot reasonably continue to rely on the same economic theory and expect it to produce a different result here.

III. The Commission's Draft Order Constitutes Unwarranted Discrimination Against Rural CLECs and Exceeds the Commission's Jurisdiction

A. The Draft Order is Inconsistent with the "Bill and Keep" Regime

While the Draft Order declares that the rules the Commission is poised to adopt are consistent with the bill-and-keep regime it envisioned in the *Connect America Fund Order*, the CLECs respectfully disagree. The fundamental premise of "bill-and-keep" is that it would provide for LECs a mutual

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20 *See* CLEC Comments at 28.

21 *See, e.g.*, Draft Order at 10 ¶ 24 (continuing to credit the IXCs' estimate of costs, despite the Commission's reduction in CEA access charges and without addressing the savings created by those orders).

22 Draft Order at 13 ¶ 32.

23 Grawe Report at 8.

24 *Id.* at 8-11; *see also* CLEC Comments at 6-13.

25 *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1158 (D.C. Cir. 2011).

recovery of costs by allowing LECs to deliver traffic to other networks without incurring additional costs.[26] Instead of creating a uniform bill-and-keep system in which these mutual cost savings can be realized, the Draft Order targets only access stimulating LECs. It therefore deprives these carriers of access revenues without providing *any* reciprocal benefit.

Further, the Commission entirely ignores the fact that it has promised a bill-and-keep regime that is "technologically" and "competitively neutral."[27] The Draft Order fails to fulfill this promise because it targets a particular type of traffic (conference calling and broadcast services) and permits some carriers (larger carriers in urban areas) to continue serving these high volume customers and engaging in revenue sharing, while preventing rural carriers from competing for the same customers.

Knowing what has been highlighted above, it is clear that the rules the Commission is poised to adopt are beyond the scope of its authority under Section 251(b)(5),[28] which requires "reciprocal compensation," and is not supported by the Tenth Circuit's decision in *In re FCC 11-161*, which upheld the Commission's authority to implement bill-and-keep based on an "in-kind exchange of services."[29] In sum, while the CLECs do not dispute the Commission's authority to implement bill-and-keep, ***this is not bill-and-keep***.

B. The Draft Order Establishes the "Network Edge" Only for a Limited Class of LECs

As previously explained, while affirming the Commission's adoption of bill-and-keep, the Tenth Circuit in *In re FCC 11-161* made clear that the Commission could not interfere with the states' authority under Section 252(d) to determine the carriers' network "edge."[30] The Draft Order defies this command by establishing the network edge for access-stimulating LECs.

While the Draft Order erroneously asserts that "[s]hifting the financial responsibility for the delivery of traffic to access-stimulating LEC end offices does not move the network edge or affect the state's ability to determine the edge," it is clearly mistaken.[31] As the Tenth Circuit has recognized, "[t]he location of the 'edge' of a carrier's network determines the transport and termination costs for the carrier."[32] Thus, by requiring access stimulating LECs to "assume financial responsibility … for any traffic between such [LEC's] terminating end office or equivalent and the associated access tandem switch,"[33] the Commission is establishing the network edge because it is determining the "transport and termination costs" that the access-stimulating LEC must bear. And, by making this determination only

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26 *See, e.g.* CLEC Comments at 73-74; Letter from D. Carter, Counsel, CLECs, to M. Dortch, Secretary, FCC, WC Docket No. 18-144, at 4 (Jan. 30, 2019) ("January 30 *Ex Parte* Letter").

27 *See* CLEC Comments at 74.

28 47 U.S.C. § 251(b)(5).

29 753 F.3d 1015, 1129 (10th Cir. 2014).

30 *See* January 30 *Ex Parte* Letter at 4 (citing *In re FCC 11-161*, 753 F.3d at 1125-27).

31 Draft Order at 33 ¶ 84.

32 *In re FCC 11-161*, 753 F.3d at 1126.

33 47 C.F.R. § 51.914(a)(2) (proposed rule).

with regard to access stimulating LECs, the Commission is singling these carriers out for adverse treatment that no other LEC is required to endure.

C. The Draft Order Deprives Rural CLECs of Much Needed Revenue

The Draft Order acknowledges that the Commission's goal is not to eliminate "access stimulation" in its entirety,[34] but rather to eliminate what the Commission deems to be "inefficient[ ]" routing and switching of this traffic.[35] Thus, if the Draft Order is adopted, carriers in urban areas with higher originating traffic volumes will be able to both continue competing for free conferencing providers *and* continue engaging in revenue sharing.[36] As such, the order uniquely targets and discriminates against rural CLECs, virtually guaranteeing that they will be deprived of this revenue opportunity.

The net result will be to erode competition in rural markets by depriving CLECs of the opportunity to generate revenues that are essential to their ability to offer innovative and competitive product offerings in areas that are costlier to serve.[37] Moreover, the Commission's rejoinder that its "high cost universal service program provides support to carriers in rural, insular, and high cost areas as necessary to ensure that consumers in such areas pay rates that are reasonably comparable to rates in urban areas,"[38] will mitigate these concerns is simply false. The Commission made CLECs ineligible for this support in its 2011 *Connect America Fund Order*.[39] Indeed, one of the reasons the Commission denied CLECs the ability to obtain that high cost support is because CLECs were given the freedom and flexibility to serve "particular classes of customers" that they deemed profitable. As supported by the attached declarations of several of the CLECs, the Draft Order, if adopted, will deprive the CLECs of their ability to serve free conferencing providers, a particular class of customers that allow them to compete in rural areas.[40] When

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34 Draft Order at 15 ¶ 37

35 *Id.* at 9 ¶ 21.

36 *See* HD Tandem *Ex Parte* Letter at 2-3; *see also* Draft Order at 12 ¶ 27 (declining to prohibit access stimulation or revenue sharing).

37 *See, e.g.*, BTC Declaration ¶ 4.

38 Draft Order at 12 ¶ 29.

39 *See In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶ 864 (2011) ("*Connect America Fund Order*") ("We decline to provide an explicit recovery mechanism for competitive LECs. Unlike incumbent LECs, because competitive carriers have generally been found to lack market power in the provision of telecommunications services, their end-user charges are not subject to comparable rate regulation, and therefore those carriers are free to recover reduced access revenue through regular end-user charges. Some competitive LECs have argued that their rates are constrained by incumbent LEC rates (as supplemented by regulated end-user charges and CAF support); to the extent this is true, we would expect this competition to constrain incumbent LECs' ability to rely on end-user recovery as well. Moreover, competitive LECs typically have not built out their networks subject to COLR obligations requiring the provision of service when no other provider will do so, and thus typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy.").

40 *See* BTC Declaration ¶¶ 7-10, 14, 16; GLCC Declaration ¶¶ 6-9, 11, 13; NVC Declaration ¶¶ 6-8, 10, 12, 14.

this opportunity is gone, those CLECs will have virtually no realistic opportunity for survival[41] because the Commission has already frozen them out of the alternative funding mechanisms that are available to incumbent carriers.[42]

D. The Draft Order Violates the Commission's Geographic Rate Averaging Policy

As noted above and through comments submitted by other parties, the Draft Order will inevitably cause conferencing providers to move their services to larger urban carriers, where revenue sharing will still be a viable option and thus where conferencing services will still be free to consumers. Conferencing providers who remain connected to rural carriers, however, likely will not be able to continue their revenue sharing relationship, meaning that if they stay there they will be forced to charge consumers for their conferencing services.[43] Therefore, the cost of free conferencing to the consumer will differ depending on the geographic location of the conferencing provider, forcing the consumer to pay for long-distance plus conference services if the call is made to a rural area, while continuing to allow the consumer to only pay its long-distance charges if the call is routed to an urban area. Such an outcome is entirely inconsistent with the Commission's geographic rate averaging requirement and its underlying policy.

The Commission has consistently recognized the benefits of geographic rate averaging, noting that such a policy "furthers our goal of providing a universal nationwide telecommunications network and ensures that ratepayers share in the benefits of nationwide interexchange competition."[44] Even where a carrier is engaged in access stimulation the Commission has noted that geographic rate averaging is of "paramount importance," and that the policy should protect "end-users placing calls to a stimulating entity" from paying more just because that entity is located in a rural, high-cost area.[45] As the Commission explained, "[c]ustomers initiating calls to access stimulating entities are generally unaware that their calls are part of an access-stimulation arrangement,"[46] and they are similarly unaware whether the free conferencing service they are calling into is located in an urban or rural area. Thus, under the Commission's own policy, whether a free conferencing service is placed in an urban or rural area, the ***total charge*** the consumer pays should be ***the same***. Thus, if adopted, the Draft Order will reverse decades' old policy that has sought to eliminate, not create, such geographic rate disparities.

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41 The Draft Order, if adopted, would have the same effect on most, if not all, free conferencing providers. *See, e.g.*, NCC Declaration ¶¶ 5-7; Sipmeeting Declaration ¶¶ 5-7; Total Bridge Declaration ¶¶ 5-7.

42 *See* BTC Declaration ¶ 13; GLCC Declaration ¶ 11; NVC Declaration ¶ 12.

43 *See* NCC Declaration ¶ 8; Sipmeeting Declaration ¶¶ 8-9; Total Bridge Declaration ¶¶ 8-9.

44 *Policy and Rules concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd. 9564, 9567 ¶ 6 (1996) (quoting *In re Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 3132 (1989)).

45 *In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, 4763 ¶ 654 (2011).

46 *Id.*

IV. The Commission's Timeline for Imposing its New Rules Will Result in Significant Call Disruption and Call Failures

The Draft Order provides that the new rules, which will eliminate a substantial revenue stream and shift financial responsibility for tandem switching and transport to access-stimulating LECs, will take effect 45 days after its publication in the *Federal Register*.[47] The CLECs agree with several other commenters that such a short time period for implementing these rules is unreasonable and will result in significant call disruptions.[48] These disruptions will occur either because IXCs immediately shift traffic back to the legacy CEA networks that lack sufficient capacity[49] or because the LECs, faced with the prospect of financial ruin, will be required to take immediate actions to terminate the delivery of traffic to their high volume customers to curb the amounts of subsidies the Commission is forcing these LECs to provide the IXCs. Indeed, call disruption is inevitable because the Commission is phasing its rules in so quickly that, even if a LEC made the decision to immediately exit the access stimulation business and discontinue all revenue sharing, it would still be required to bear the financial costs of tandem switching and transport for a period of 6 months.[50] Thus, by preventing carriers and their customers from having a reasonable period of time to phase out their high volume services, the immediate implementation of the Commission's proposed rules seems designed to guarantee call disruptions.

Such an unsettling outcome is not reasonable and was not foreseeable to the CLECs and other interested parties through the Access Stimulation NPRM, as the NPRM was built on the premise that reforms were necessary because IXCs were being denied direct connections.[51] When the record proved that this assertion was unfounded,[52] the Commission did not provide notice that it was considering an alternative proposal that would bind the LECs' hands and give them no options to continue with their business practices. The Commission did not provide commenters or the public with reasonable notice that the agency would, instead, provide LECs with no other option but to flash cut their primary revenue stream, going from having a lawful means of earning profits to having a significant cost center in a matter of days.

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47 Draft Order at 25 ¶¶ 61-63.

48 *See, e.g.* Email from J. RedCloud, Executive Director, Oceti Sakowin Tribal Utility Authority, to FCC Commissioners, at 2 (Sept. 12, 2019) ("[I]t is a travesty and an unnecessary economic assault to implement such sweeping changes that irreparably harm rural carriers and residents of Tribal lands in a historically swift manner."); Letter from A. Nickerson, CEO, Wide Voice, LLC, to M. Dortch, Secretary, FCC, at 6 (Sept. 16, 2019) ("Wide Voice *Ex Parte* Letter"); HD Tandem *Ex Parte* Letter at 3.

49 HD Tandem *Ex Parte* Letter at 3.

50 *See* Draft Order at 19-20 ¶ 47; *see also* BTC Declaration ¶ 11; GLCC Declaration ¶ 10; NVC Declaration ¶ 11.

51 *See* Access Stimulation NPRM at 5-8 ¶¶ 13-22.

52 *See* Draft Order at 16 ¶ 39 n.104 (refusing to "address at this time the discussion in the record regarding the conduct of any negotiations between IXCs and LECs regarding establishing direct connections").

V. The 6:1 Ratio Lacks Evidentiary Support

The CLECs also agree with those commenters asserting that the Draft Order's expanded definition of access stimulation, which would include situations in which no revenue sharing is occurring, was not foreseeable, is not supported by record evidence, and is arbitrary.

First, the CLECs agree both with the comments of Wide Voice, LLC ("Wide Voice") that the Draft Order's 6:1 ratio is not the proposal that Inteliquent actually made[53] and with those commenters asserting the 6:1 ratio was not included in the Access Stimulation NPRM and cannot otherwise be found in the record.[54] Thus, the Commission did not afford industry participants reasonable notice to address the significant business impacts that could be caused by this expanded definition. This fact is best highlighted by NTCA's recent *ex parte* filing, wherein it describes its surprise when it learned that several of its members, who have never engaged in revenue sharing, would nevertheless now be subject to the Commission's access stimulation rules.[55]

Second, the CLECs agree with those commenters who assert that this new trigger is arbitrary.[56] The sole rationale for adopting this specific trigger is that it is "twice the existing ratio and is the ratio recommended by Inteliquent."[57] Of course, this does not address the basic premise of why a carrier that terminates more traffic than it originates, but which has never engaged in revenue sharing, should now be labeled an "access stimulator." For example, the Commission never explains why it would be unjust and unreasonable for a rural LEC to attract a call center or other operation that has high volumes of terminating traffic, but now rural CLECs will be forced to forgo this type of business for fear that bringing on such a customer will actually destroy, rather than help, their business.[58]

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53 Wide Voice *Ex Parte* Letter at 1-3.

54 *See, e.g.*, HD Tandem *Ex Parte* Letter at 4.

55 *See* Letter from M. Romano, Senior Vice President – Industry Affairs & Business Development, NTCA-The Rural Broadband Association, to M. Dortch, Secretary, FCC, at 1-2 (Sept. 11, 2019); *see also* Letter from D. Owens, Senior Vice President of Government and Industry Affairs, WTA – Advocates for Rural Broadband, to M. Dortch, Secretary, FCC, at 1 (Sept. 18, 2019) ("WTA *Ex Parte* Letter") ("It is WTA's understanding that National Exchange Carrier Association ('NECA') data indicates that approximately three-to-four percent of Rural LECs that are not in any manner engaged in 'access stimulation' may have interstate terminating-to-originating traffic ratios that exceed 6:1 during some months.").

56 *See* Wide Voice *Ex Parte* Letter at 1-3; HD Tandem *Ex Parte* Letter at 3-4.

57 Draft Order at 19 ¶ 45.

58 *See, e.g.*, Declaration of Kevin Skinner on Behalf of BTC, Inc. d/b/a Western Iowa Networks; *see also* WTA *Ex Parte* Letter at 1 ("A common reason [for exceeding the 6:1 ratio] is that the carrier has a call center or other legitimate business customer that receives many more interstate terminating calls than it originates."); Letter from J. Jones, Data Tech, Inc., to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 1-2 (Sept. 17, 2019) ("Data Tech *Ex Parte* Letter") ("Many CLECs target business and enterprise customers either primarily or exclusively. The ratio of inbound calls to business subscribers vs. residential subscribers can vary significantly. For example, businesses will receive many more inbound calls relative to their outbound calls than residential end users will (e.g., call centers)…. The typical terminating/ originating ratio for billed access minutes varies based on a number of variables…. Business subscribers can be as high as 4:1 - sometimes greater. If the subscriber is a call center and inbound 8YY counts in the ratio calculation (since it is largely interstate, I assume it would), then that subscriber could be a high volume 10:1 subscriber and skew the remainder of the subscriber ratios dramatically.").

Third, insofar as the Commission encourages policing by IXCs based on their own traffic volumes,[59] the Draft Order is arbitrary. As Wide Voice explains, LECs "typically make their inbound and outbound call decision separately;"[60] thus, it is nearly impossible to envision a situation in which ***any LEC*** would not meet the 6:1 ratio on ***at least one IXC***.[61] More likely, nearly every LEC will meet the trigger on every IXC, with the exception of the primary IXC that it selects for the routing of its originating traffic.[62] Accordingly, the 6:1 trigger will necessarily cause confusion, generate disputes, and give IXCs more opportunities to refuse to pay for the access services they utilize and financially benefit from.[63]

Fourth, the CLECs agree with comments that the trigger is vague because it fails to clarify whether traffic routed through contractual, rather than tariffed, routes will be considered in evaluating a LEC's terminating-to-originating ratios.[64]

VI. The Commission's Draft Order Violates the Constitution

Under the Fifth Amendment's Takings Clause, "private property" may not be "taken for public use" without "just compensation."[65] The Supreme Court has explained that, "the purpose of the Takings Clause … is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[66] "There is no doubt" that property interests "besides land ownership" are "also protected by the Fifth Amendment."[67] And, federal courts have repeatedly found unconstitutional takings when government regulations deprive business owners of significant, expected revenue streams associated with their property.[68]

The Draft Order sounds the death knell for the CLECs that have lawfully abided by the Commission's 2011 access stimulation rules. These businesses, relying on preexisting access stimulation regulations, invested substantial resources in high volume services.[69] In a 45-day span, the Draft Order will both wipe out the value of those investments and prevent the CLECs from operating as financially

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59 Draft Order at 21 ¶ 51.

60 Wide Voice *Ex Parte* Letter at 3.

61 *See* BTC Declaration ¶ 12.

62 *See id.*

63 *See* WTA *Ex Parte* Letter at 2 ("WTA members are concerned that certain interexchange carriers may calculate the interstate terminating-to-originating ratio for the traffic that they deliver to a particular Rural LEC, and engage in self-help by refusing to pay access tandem and transport charges if their own traffic ratio exceeds the test criterion even if the Rural LEC's ratio for all of its interstate traffic is well below that criterion.").

64 Data Tech *Ex Parte* Letter at 2.

65 U.S. Const. amend. V.

66 *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-17 (2001)).

67 *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990); *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (determining that the Fifth Amendment protected an intangible property interest in a trade secret).

68 *See, e.g.*, *Yancey*, 915 F.2d at 1542 (find taking when turkey farmers were forced to sell flock for slaughter after quarantine); *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 43 (1999) (holding that landowners could recover when denied dredge and fill permit); *Formanek v. United States*, 26 Cl. Ct. 332, 335 (1992) (holding that landowners could recover when denied discharge permit).

69 *See, e.g.*, BTC Declaration ¶ 3; GLCC Declaration ¶ 3; NVC Declaration ¶ 3.

viable enterprises.[70] Because the Draft Order eliminates access stimulation as a revenue stream for the CLECs and provides no realistic alternative means of compensation for them,[71] it violates the Takings Clause of the Fifth Amendment.[72]

VII. The Commission Should Address the CLEC's Proposal to Adopt a Uniform National Benchmark Rate

Rather than impose a discriminatory regime and harm consumers in the process, and to ensure rural, high-cost carriers do not become unprofitable, if the Commission elects to impose any new access stimulation rules through its Draft Order, it should adopt a uniform rate for access stimulating traffic that mirrors the rates charged by PacBell, the largest price cap ILEC in the country. As the CLECs have already explained, PacBell's rates are based on traffic volumes "far in excess of any prior estimates of access stimulation traffic,"[73] and, as such, reflect just and reasonable rates for high traffic volumes.

Numerous commenters have explained that *some* compensation must be provided to rural carriers for the traffic they terminate for the benefit of IXCs.[74] At the very least, the participants involved in this proceeding – and the Commission – should be able to agree that the rate charged by PacBell, an IXC-affiliated ILEC, is reasonable.[75]

VIII. Conclusion

In its Draft Order, the Commission tosses aside the only current data and evidence submitted in this proceeding, choosing instead to engage in arbitrary and capricious decision making and propose rules that are discriminatory, ill-defined, and in violation of rural carriers' constitutional rights. Accordingly, the CLECs urge the Commission to either adopt a uniform rate for access stimulating traffic that mirrors the rates charged by PacBell or postpone any further unless and until the agency gathers current data and evidence from all parties involved.

Respectfully submitted,

G. David Carter

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70 *See, e.g.*, BTC Declaration ¶¶ 7-9; GLCC Declaration ¶¶ 6-8; NVC Declaration ¶¶ 6-8.

71 *See, e.g.*, BTC Declaration ¶¶ 10-11, 13-15; GLCC Declaration ¶¶ 9-12; NVC Declaration ¶¶ 10-13.

72 At a minimum, the Commission has not engaged in "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances," which are a necessary prerequisite to a decision with ramifications under the Takings Clause. *Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)); *accord Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1181-82 (D.C. Cir. 1987) (en banc) (remanding FERC rate order because FERC failed to make sufficient factual findings to establish whether rate order amounted to unconstitutional taking).

73 CLEC Comments at 34.

74 *See, e.g.*, Letter from A. Nickerson, CEO, Wide Voice, LLC, to M. Dortch, Secretary, FCC, at 2 (Jan. 14, 2019).

75 *See* CLEC Comments at 34.

cc: Chairman Ajit Pai
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Commissioner Michael O'Rielly
Commissioner Jessica Rosenworcel
Commissioner Geoffrey Starks
Susan Bahr
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